CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2282
Heard at Montreal, Wednesday, 9 September 1992
concerning
VIA RAIL CANADA INC.
and
CANADIAN BROTHERHOOD OF RAILWAY,TRANSPORT AND GENERAL WORKERS

DISPUTE:

The removal of Maintenance of Earnings (MOE) protection from Ms. C. Stracuzza from June 19, 1991 to October 30, 1991.

JOINT STATEMENT OF ISSUE:

On Regional Bulletin 91-03, a temporary vacancy of approximately four and one-half months' duration, from June 15 to October 15, 1991, was advertised. The vacancy was for a Counter Sales Agent position with baggage duties. Ms. Stracuzza was holding a regular part-time position of Counter Sales Agent, at Stratford, at that time. She was then receiving a maintenance of earnings incumbency. Effective June 15, 1991, the Corporation removed her maintenance of earnings protection temporarily as, in its opinion, she had failed to protect her incumbency rate, in accordance with Article E.3(ii) of the Special Agreement. The Corporation contends that Ms. Stracuzza
failed to apply for the position in question as it never received her ``bid form'' and the Local Chairperson could not provide her copy.

The Brotherhood maintains that Ms. Stracuzza was aware of her obligation and that, in fact, she did apply for the position in question and that her bid forms were lost in VIA's internal mail. The Brotherhood argues that Ms. Stracuzza should not be held accountable to find VIA's mail.

It is further argued by the Brotherhood that even if the application
of Ms. Stracuzza had not been lost or misplaced, she would not have been the successful applicant because a senior employee to her had been awarded the position.

The Corporation has rejected the grievance at all steps of the grievance procedure.

FOR THE BROTHERHOOD:
(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT
LABOUR

FOR THE CORPORATION:
(SGD.) C. C. MUGGERIDGE
DEPARTMENT DIRECTOR,
RELATIONS

There appeared on behalf of the Corporation:
D. S. Fisher Senior Officer, Labour Relations, Montreal

M. St-Jules	Senior Negotiator and Advisor, Labour Relations, Montreal
C. Pollock	Senior Officer, Labour Relations, Montreal
J. Ouellett	Officer, Research, Labour Relations, Montreal

And on behalf of the Brotherhood:

T. N. Stol	National Vice-President, Ottawa
C. Stracuzza	Grievor

AWARD OF THE ARBITRATOR

On the basis of the evidence adduced, and the materials submitted, the Arbitrator is satisfied that the grievor, who was employed as a Counter Sales Agent at Stratford, in receipt of maintenance of earnings protection, became aware of the content of Bulletin 91-03 and duly completed and mailed an application for the position in the normal form, following the usual process. Ms. Stracuzza, whose evidence was not cross-examined by the Corporation and whose testimony the Arbitrator accepts without qualification, filled out the application for the bulletined position on the quadruplicate carbon form provided by the Corporation. She kept a copy for herself and placed copies addressed to the employing department, her local chairperson and the Corporation's human resources department in separate envelopes, all three of which were then placed into a single sealed envelope. Because the grievor worked at an outpost location, it was necessary for her to send the documentation, rather than deliver it personally, as might have been the case had she worked in a larger centre.

It is common ground that in these circumstances the accepted procedure is for employees to send the documentation by the Corporation's internal OCS mail system. The Arbitrator is satisfied that that is what the grievor did. She handed the sealed envelope containing the three individual envelopes to the conductor on Train 188 to be delivered to the Stationmaster's Office at Union Station in Toronto. The written statement of the conductor, filed in evidence, confirms that upon arrival at Union Station he placed the envelope in the out box at that location.
The whereabouts of the application forms after they were delivered to Union Station is unknown. It is common ground that the Corporation has no record of having received them, nor does the grievor's local chairperson, who is located in London, Ontario. He would have normally received a forwarded copy through the OCS. It is also common ground that the grievor could not, in any event, have been the successful applicant. Although she was qualified for the bulletined position, she was substantially junior to the successful applicant.

The Corporation justifies the suspension of Ms. Stracuzza's maintenance of earnings protection, amounting to some $450.00 per pay period between June 15, 1991 and October 30, 1991, on the basis that she allegedly failed to apply for the position. In this regard it relies on the provisions of article E.3 of the Special Agreement between the parties which is, in part, as follows:

> E.4 The maintenance of employee's earnings will continue until: ...

(ii) the employee fails to apply for a position, the rate of which is higher by an amount of $2.00 per week or more than the rate of the position which he is presently holding and for which he is qualified at the location where he is employed.

In the application of Article E.3(ii) above, an employee who fails to apply for a higher-rated position (excluding a temporary vacancy of less than three months), for which he is qualified, will be considered as occupying such position and his incumbency shall be reduced correspondingly. In the case of a temporary vacancy of three months or more, his incumbency will be reduced only for the duration of that temporary vacancy.

The Corporation submits that in the circumstances the grievor failed to apply for a temporary vacancy of three months or more, and that it was justified in reducing her incumbency accordingly for the duration of that temporary vacancy.

In further support of its position it points to the provisions of article 12.3 of Collective Agreement No. 1 which govern the process for bidding positions of regional bulletins. It provides as follows:

12.3

> All bulletins will show classification and location of the position, general description of duties, necessary qualifications (where applicable), rate of pay, hours of assignment including meal period, assigned rest days, the approximate date of commencement for seasonal and temporary assignments and their approximate duration.
>
> Where the nature of the work will require the successful applicant to perform his duties outside, such information will be specified in the bulletin.
>
> Employees other than those referred to in Article 11.9 desiring such position will submit written application showing seniority number, present classification and location, together with their qualifications. Except as provided in Article 12.4, applications must be filed to reach the designated officer not later than the tenth day after the date of bulletin. As evidence that an application has been submitted each applicant must forward a copy of his application to his Local Chairperson.(emphasis added)

The Corporation submits that in the circumstances the grievor cannot be said to have applied for the position, within the terms of article 12.3 of the collective agreement. In that regard it relies, in part, on an earlier award of this Office pertaining to a late application for a bulletin. In CROA 930 the arbitrator found that the late arrival of the grievor's application fell outside the mandatory requirements of the collective agreement, and dismissed the grievance. In doing so he reasoned, in part, as follows:

The thrust of the union's argument was, in effect, that the grievor mailed his application in ample time for it to be delivered in the normal course. A copy was received in time by the Local Chairman, as the Joint Statement sets out, The fact is, however, that the application did not reach the designated officer before the expiry of the announced time.

Article 14.3 provides that applications "must reach" the designated officer on time, and in the bulletin the Company advised that applications received after the closing date would not be accepted. These provisions are mandatory, and they are not unreasonable. Their effect is that it is the applicant who must bear any risks associated with the method of communication chosen by him. In the instant case, the grievor has suffered, it would seem, because of an unsatisfactory mail service. The loss thus caused, however, does not fall on the Company or on the successful candidate. The grievor's application simply did not meet the requirements of the Collective Agreement, even although that was through no fault of his.

The Corporation also relies upon comments made by this Office in respect of the failure to abide by time limits where it is disclosed that documents relating to the grievance procedure arrived beyond the specified time limits by reason of postal delays (CROA 149, 1233).

The importance to the Corporation of the clear rule reflected in CROA 930 is readily appreciated by the Arbitrator. However, in my view, for reasons elaborated below, this matter must be resolved by interpreting article E.3 of the Special Agreement. While I am satisfied that the interpretation of article 12.3 advanced by the Corporation is correct, I am not persuaded that that position is a full answer to the grievance at hand, which does not involve a claim to a position, but the protection of certain vested rights. The requirement for communicating an application for a bulletin provided for in article 12.3 must be understood in light of its fundamental purpose. It is designed to ensure clarity and finality in the administration of promotion and job competitions as among competing employees. Both the employees and the Corporation are entitled to know, at a given point in time, who is the successful applicant for a bulletined position. If it were otherwise the unsettling effect of late claims could substantially undermine the administration of the collective agreement.

Does it follow, however, that failure to meet the time limits for filing an application as provided in article 12.3 was intended to have consequences beyond the purpose of determining the eligibility of a given application? In the Arbitrator's view the requirements of article E.3 of the Special Agreement, with respect of the obligation to apply for a higher rated position to protect maintenance of earnings, must be construed in light of the very different purpose of that provision. The trade-off provided for in that article is

that an employee receives the extraordinary benefit of maintenance of earnings protection on the understanding that he or she must be prepared to lend his or her services and productivity to the highest rated position for which the employee is qualified. If the employee fails to do so the Corporation is relieved of its obligation to continue to pay the maintenance of earnings incumbency, and where the position in question involves a temporary vacancy of three months or more, the incumbency is to be suspended for the duration of the vacancy. The substance and purpose of that provision are substantially different from determining who is or is not an eligible applicant for the purposes of finalizing a bulletin competition. In that context the Arbitrator is satisfied that the concept of applying for a higher rated position reflected in the final paragraph of article E.3 of the Special Agreement is to be viewed more broadly than the more narrow concept of compliance with the technical requirement of applying for a position found in article 12.3 of the collective agreement.

The provisions of a collective agreement, a special agreement and related documents are to be construed in a purposive and rational fashion. The bargain which article E.3 of the Special Agreement represents is an understanding that the Corporation is not bear to the burden of continued maintenance of earnings payments for an employee who could have occupied a higher rated position and failed to take the steps to do so.

That bargain is plainly not affected by the facts of the case at hand. Firstly, for the reasons related above, the grievor did all within her power to apply for the temporary vacancy posted at Stratford. As an employee at an outpost location, she was at a disadvantage as compared with employees in lager centres, and accordingly relied upon the Corporation's own OCS mail system, in accordance with established practice. In the circumstances, I cannot accept the submission of the Corporation that she can fairly be characterized as having failed to apply for the position, as that concept is to be understood within article E.3 of the Special Agreement. It should be stressed that that finding is predicated upon the substantial evidence before the Arbitrator confirming that Ms. Stracuzza did in fact file the application in the manner described, a proposition not seriously disputed by the Corporation.

There is no suggestion of fraud or negligence on her part disclosed in the evidence. Secondly, as the Brotherhood's representative submits, there is no violation of the bargain underlying article E.3 of the Special Agreement possible in the facts of the case at hand. It is common ground that the grievor was, in any event, ineligible to succeed in the application because of her seniority. This is not a circumstance where it could be said that the employee who could

have held the bulletined position failed to apply, and is therefore disentitled to maintenance of earnings payments.

The maintenance of earnings protection found within the Special Agreement is, like Employment Security, among the most important vested rights of an employee gained by the efforts of collective bargaining by the Brotherhood and by virtue of the employee's own service to the Corporation. The loss or suspension of such rights should not lightly be inferred from general language, nor by the indirect application of a technical provision intended for another purpose. It would, in my view, require clear and unequivocal language to support the position of the Corporation that an employee is at risk of losing so valuable a protection by the arbitrary chance of her location and the vagaries of the Corporation's own internal mail system.

Lastly, the Corporation's representative argues that the grievance must fail because the Joint Statement of Issue makes reference to no provision of the collective agreement which has been violated. That submission is without merit. As is clear from the text of the joint statement, signed by the Corporation without apparent objection, the issue in dispute is the Corporation's interpretation and application of article E.3(ii) of the Special Agreement, which is itself a form of collective agreement of the type contemplated by paragraph 4 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration.

In summary, the Arbitrator is satisfied that the grievor did apply for the bulletined position by filing her application within the Corporation's OCS mail system. She followed the process long accepted by the Corporation and her application must be found to have been sufficiently made for the purposes of article E.3 of the Special Agreement. The underlying purpose of that provision has in no way been violated since, in any event, she could not have been a successful applicant. The Arbitrator directs that the Corporation restore, forthwith, to the grievor all wages and benefits lost to her by virtue of the suspension of her maintenance of earnings for the period between June 15 and October 30, 1991, or such other date as her maintenance of earnings was restored.

September 11, 1992

(Sgd.) MICHEL G. PICHER
ARBITRATOR